

Message Text

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FM AMEMBASSY NEW DELHI

TO SECSTATE WASHDC 6321

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TAGS: OGEN, IN

SUBJ: MESSAGE FOR SENATOR TAFT

REF: NEW DELHI 0227

IF THE DEPARTMENT PERCEIVES NO OBJECTION, PLEASE PASS
THIS LETTER FROM CHARGE SCHNEIDER TO SENATOR TAFT:

1. "WE HAVE DONE SOME MORE CHECKING INTO INDIAN PERFORMANCE UNDER ARBITRATION AWARDS AS PROMISED BY AMBASSADOR MOYNIHAN JUST BEFORE HE DEPARTED NEW DELHI."

2. "THE GOVERNMENT OF INDIA ASSURES US THAT IT HAS NO POLICY OF ENCOURAGING FIRMS ADVERSELY AFFECTED BY ARBITRATION TO SEEK REDRESS IN INDIAN COURTS. WE UNDERSTAND ITS POLICY IS TO REFRAIN FROM INTERFERING IN CASES IN WHICH ARBITRATION HAS GONE AGAINST INDIA EXCEPT IN CASES WHERE IT FEELS THERE WAS A SERIOUS MISTAKE IN THE PROCEEDINGS.

3. "THE OFFICIAL INDIAN POSITION IS TO ENCOURAGE ARBITRATION AS AN APPROPRIATE METHOD OF SOLVING INTERNATIONAL COMMERCIAL DISPUTES. WE HAVE CHECKED WITH THE EMBASSIES OF SEVERAL LEADING COMMERCIAL COUNTRIES WITHOUT UNCOVERING ANY RECOLLECTION OF AN ADVERSE EXPERIENCE WITH THE ARBITRATION PROCESS IN INDIA. THE CONSENSUS OF THESE EMBASSIES WAS QUITE FAVORABLE TO THE INDIAN ATTITUDE AND PRACTICE REGARDING ARBITRATION."

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4. "IT IS TRUE THAT INDIA ENCOURAGES INDIA AS THE VENUE FOR ARBITRATION CASES, BUT INDIAN OFFICIALS EXPLAIN THIS AS AN ATTEMPT TO MINIMIZE TRAVEL AND OTHER EXPENSES BY A POOR COUNTRY. FURTHERMORE, FOR CONTRACTS TO BE PERFORMED WHOLLY OR LARGELY WITHIN INDIA, THE INDIAN POSITION IN THIS REGARD SHOULD PERHAPS NOT BE VIEWED AS UNREASONABLE."

5 "ALTHOUGH WE HAVE NOT BEEN ABLE TO DO EXHAUSTIVE RESEARCH, OUR IMPRESSION IS THAT WHEN CASES HAVE GONE TO THE COURT THEY HAVE SHOWED INTEGRITY ON ARBITRATION CASES AND THAT INDIAN APPLICANTS BY NO MEANS ALWAYS WIN. FURTHERMORE, UNDER THE INDIAN ARBITRATION ACT (THE STATUTE SETTING FORTH THE SCOPE OF AN INDIAN COURT IN AN ARBITRATION MATTER). THERE IS ONLY A VERY LIMITED RIGHT TO JUDICIAL REVIEW - NAMELY, CONCERNING SUCH MATTERS AS WHETHER THE AWARD IS IMPERFECT IN FORM; WHETHER IT INVOLVES CLERICAL ERRORS; WHETHER IT IS AMBIGUOUS; AND WHETHER AN OBJECTION TO THE LEGALITY OF THE AWARD IS APPARENT ON ITS FACE. THIS APPROACH IS CONSISTENT WITH THAT UNDER THE CONVENTION ON FOREIGN ARBITRAL AWARDS. THERE IS, IN BRIEF, NO RIGHT TO REOPEN, BEFORE AN INDIAN COURT, THE MERITS OF AN ARBITRATION AWARD AND THUS, IN THE NORMAL CASE, THERE IS NO REAL INCENTIVE FOR AN AGGRIEVED PARTY - UNLESS HE HAS A GOOD OBJECTION OF A NARROW TYPE - TO SEEK REDRESS BEFORE AN INDIAN COURT."

6 "YOUR LETTER CITES TWO RECENT INDIAN ARBITRATION CASES INVOLVING AMERICAN FIRMS. IN THE FIRST OF THESE, YOU ARE CORRECT THAT THE INDIAN FIRM, THE FERTILIZER CORPORATION OF INDIA, HAS APPEALED THE ARBITRATION AWARD. IT IS STILL PREPARING ITS CASE AND WE DON'T KNOW WHAT ARGUMENT IT WILL ADVANCE. THE CONTRACT DOES EXPRESSLY INCORPORATE THE INDIAN ARBITRATION ACT, REFERRED TO ABOVE, AND STATES THAT THE COURTS AT NEW DELHI WILL HAVE JURISDICTION AS TO ALL DISPUTES, INCLUDING THOSE ARISING OUT OF ARBITRATION PROCEEDINGS.

7. "AS YOU ARE AWARE, THE SECOND CASE (INVOLVING THE PARTIES TO THE TROMBAY FERTILIZER PLANT CONSTRUCTION) LIMITED OFFICIAL USE

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IS UNDER ARBITRATION BUT NO AWARD HAS BEEN MADE AS YET. THE NEXT HEARING IN THE PROCEEDINGS IS SCHEDULED TO TAKE PLACE IN NEW DELHI BETWEEN MARCH 6 AND 21. THE CONTRACT IN THAT CASE CALLS FOR FINAL SETTLEMENT OF DISPUTES ARISING THEREUNDER TO BE "IN CONFORMITY WITH THE RULES OF CONCILIATION AND ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE". WE HAVE NO REASON TO BELIEVE THIS PROCEDURE WILL NOT BE CAREFULLY FOLLOWED.

IT IS UNFORTUNATE THAT THE U.S. FIRM INVOLVED MAY INDEED BE INCURRING LARGE OUT-OF-POCKET EXPENSES IN CONNECTION WITH THIS ARBITRATION BUT, AGAIN, THE CONTRACT AS MUTUALLY ACCEPTED DOES CALL, FOR NEW DELHI TO BE THE VENUE OF ALL ARBITRATION PROCEEDINGS.

8. "I HOPE THIS INFORMATION IS RESPONSIVE TO YOUR INQUIRY AND THAT YOU WILL LET US KNOW IF WE CAN BE OF FURTHER ASSISTANCE."

9. FYI: CONINCIDENTIALLY, MR. HOWARD M. HOLTZMANN, CHAIRMAN INTERNATIONAL ARBITRATION COMMITTEE OF THE AMERICAN ARBITRATION ASSOCIATION, WAS IN NEW DELHI LAST WEEK FOR THE FIFTH INTERNATIONAL CONFERENCE ON ARBITRATION AND PROVIDED US WITH USEFUL BACKGROUND MATERIAL ON THE TWO CASES. WE HAVE INCORPORATED SOME OF IT INTO THE REPLY TO SENATOR TAFT AND ARE PREPARING A COMPANION TELEGRAM WITH SOME ADDITIONAL INFORMATION.
SCHNEIDER

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